

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEE PREMISE MANUEL,

Defendant-Appellant.

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UNPUBLISHED

March 11, 2008

No. 275209

Macomb Circuit Court

LC No. 2005-005152-FC

Before: Murray, P.J., and Bandstra and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and contributing to the delinquency of a minor, MCL 750.145. He was sentenced to concurrent prison terms of 126 to 240 months for the CSC conviction and 90 days for the contributing to the delinquency of a minor conviction. He appeals as of right, and we affirm.

**I. Underlying Facts**

Defendant was convicted of sexually assaulting the victim on April 13, 2004, when she was 12 years old. The victim, age 14 at the time of trial, testified that on April 12, 2004, she “ran away” from home after being grounded. The victim saw defendant as she was en route to meet a friend in “the village,” which is a neighborhood of apartments and townhouses in Clinton Township. The victim described defendant as someone she could “hang out with,” and told defendant that she was 17 years old. Defendant and the victim went to a townhouse in the village where they drank alcohol. The following day, defendant and the victim went to a different townhouse where they continued to drink alcohol and smoke marijuana. The victim explained that, at one point, as she was sitting on a couch, defendant took off her clothing, digitally penetrated her vagina, and put his penis in her vagina. The victim did not want defendant to touch her and said, “No and stop.” After the incident, the victim did not go home because she was afraid of being punished.

The victim indicated that, at approximately 11:00 p.m., defendant and “Rick” drove her and “Chantel” to Michigan Avenue in Detroit. The victim explained that defendant and Rick left them in the area to engage in acts of prostitution to earn money for the group to travel to Florida. The victim did not engage in any acts of prostitution, although Chantel did. In the early morning, defendant and Rick returned, picked up the two girls, and the group went to a motel in

Roseville where they smoked marijuana and drank alcohol. At approximately 5:00 p.m., the police arrived.

According to a police witness, the Roseville police received a report of minors living in a motel room. In the room, the police found defendant, the victim, and a 15-year-old girl. Subsequent deoxyribonucleic acid (DNA) testing of semen taken from the victim's vaginal and cervical areas revealed the presence of DNA that matched a DNA sample taken from defendant. In a statement made to the police, defendant denied having any sexual contact with the victim, but admitted that he smoked marijuana and drank alcohol with the victim and another girl. Defendant stated that he was in the motel room when a friend brought the victim to the room, and that the victim claimed to be older. At trial, defendant denied any wrongdoing, and argued that the victim was not credible and that the chain of DNA evidence had been compromised.

## II. Self-Representation

Defendant was permitted to represent himself at trial, with his appointed attorney serving as standby advisory counsel. Defendant now argues that the trial court erred by allowing him to represent himself at trial “without adequate warnings of the dangers of self-representation and without adequate compliance with MCR 6.005(D).” We disagree.

When reviewing a criminal defendant's waiver of the right to counsel, we review the trial court's factual findings for clear error, and the interpretation or application of any legal or constitutional issues de novo. *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004). A trial court's ultimate decision to permit a defendant to represent himself is reviewed for an abuse of discretion. *People v Hicks*, 259 Mich App 518, 521; 675 NW2d 599 (2003).

Before a defendant may represent himself, the trial court must determine that the waiver of counsel is unequivocal, knowing, voluntary, intelligent, and made with an awareness of the risks involved; also, the self-representation must not disrupt trial proceedings. *People v Williams*, 470 Mich 634, 642; 683 NW2d 597 (2004). In addition, the trial court is required to comply with the requirements of MCR 6.005. *Id.* Pursuant to MCR 6.005(D), the trial court may not allow a defendant to make an initial waiver of the right to counsel without first

- (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and
- (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

The court rule requires “substantial compliance” rather than a formalistic “litany approach.” The trial court must be certain that the requirements for a proper waiver are met, but superficial irregularities will not give rise to an “appellate parachute.” *Russell, supra* at 191-192 (citation omitted). Nevertheless, trial courts “*must* indulge every reasonable presumption against the waiver of the right to counsel.” *Id.* at 193 (emphasis in original).

The record shows that the trial court apprised defendant of the dangers and disadvantages of self-representation, and that defendant's waiver of his right to counsel was knowing,

intelligent, and voluntary.<sup>1</sup> After defendant expressed his desire to represent himself, the trial court asked defendant if he understood his rights. Defendant acknowledged that he had represented himself at a preliminary matter. The trial court then explained to defendant that he would be obligated to follow the trial procedures, and cautioned defendant that he “could be making a big mistake” by waiving counsel, whom the court described as “one of the best criminal lawyers in the county.” The court informed defendant that he was facing charges that carried possible life sentences, and repeatedly questioned defendant’s decision to defend himself as opposed to utilizing “one of the most qualified criminal attorneys in the county.” Defendant consistently affirmed his decision to proceed without counsel. The trial court adequately informed defendant of the dangers and disadvantages of self-representation. Contrary to defendant’s implication, the trial court was not required to pressure him into relinquishing his right to waive counsel. See *People v Morton*, 175 Mich App 1, 7; 437 NW2d 284 (1989).

The trial court also substantially complied with the requirements of MCR 6.005. At the beginning of trial, the court stated the charges, and the record indicates that defendant understood the charges he was facing. Although the court did not delineate all the possible sentences, it informed defendant that “a couple of these charges are life charges.” As indicated previously, the trial court sufficiently advised defendant of the risks involved in self-representation. Finally, the trial court offered defendant the opportunity to consult with an appointed lawyer, which defendant accepted.

In sum, “[d]efendant was fully apprised of the risks he faced by choosing to represent himself and he knowingly and voluntarily chose to accept them. He may not now be heard to complain about his choice.” *Williams, supra* at 645 (internal citation and quotation omitted).<sup>2</sup>

### III. Effective Assistance of Standby Counsel

Defendant also argues that he is entitled to a new trial because standby counsel was ineffective for failing to subpoena a witness. We disagree.

Before trial, defendant expressed his intent to introduce a statement allegedly made by the victim to a caseworker, indicating that the victim told the caseworker that she had sexual encounters with another person. The prosecutor objected on the basis that defendant’s claim was not true and that any statement was barred by the rape-shield statute, MCL 750.520j. The trial

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<sup>1</sup> The court must determine that the defendant is asserting his right knowingly, intelligently, and voluntarily “through a colloquy advising the defendant of the dangers and disadvantages of self-representation.” *Russell, supra* at 190.

<sup>2</sup> In *Williams*, our Supreme Court explained:

To permit a defendant in a criminal case to indulge in the charade of insisting on a right to act as his own attorney and then on appeal to use the very permission to defend himself in pro per as a basis for reversal of conviction and a grant of another trial is to make a mockery of the criminal justice system and the constitutional rights sought to be protected. [*Id.*]

court noted that defendant was representing himself and that it wanted any witness who defendant had requested be subpoenaed to be produced in order to protect his rights. The court ruled that, after the witness is brought in and questioned, it would make a ruling regarding the admissibility of her testimony. The prosecutor noted that she had no information about the witness and no subpoena. Standby counsel then agreed to provide the prosecutor with a subpoena for the witness. Trial concluded with no further mention being made about the court's ruling or the witness.

Generally, “‘standby counsel is not ‘counsel’ within the meaning of the Sixth Amendment.’” *People v Willing*, 267 Mich App 208, 228; 704 NW2d 472 (2005) (quotation omitted). Standby counsel “may offer advice, but . . . does not speak for the defendant or bear responsibility for his defense,” *id.*, and the defendant must accept the consequences of representing himself. *People v Kevorkian*, 248 Mich App 373, 422; 639 NW2d 291 (2001). Here, however, standby counsel accepted the responsibility to subpoena the witness on defendant's behalf. Thus, for that particular matter, standby counsel was arguably acting as counsel for defendant and, therefore, can be held to the standards of trial counsel.

But because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

Here, defendant has not provided a witness affidavit, or identified any evidence of record establishing that the proposed witness's testimony would have yielded valuable evidence that would have affected the outcome of trial. See MCR 7.210(A)(1). Simply put, defendant's unsupported assertion in his brief that the witness could have supported his defense is insufficient to establish that trial counsel was ineffective. *Effinger, supra*.

#### IV. Prosecutorial Misconduct

Defendant further argues that he is entitled to a new trial because the prosecutor made an improper argument. We disagree. Because defendant failed to object to the prosecutor's remarks, we review this claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999). “No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction.” *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), lv den 463 Mich 928 (2000), abrogated in part on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Defendant contends that the prosecutor impermissibly appealed to the jurors' sympathies and civic duty when she made the following comments during rebuttal argument:

You can look at a 12-year old and one 12-year old might be playing with American girls and - - and the dolls - - and playing with Barbies. You can look at another 12-year old and they're dressing like they're 15 or 16 and trying to go and - - and start to try different drugs and try - - start to hang out with older kids. You can think of different examples of that. But when you think of [the victim] and what you saw from her, she is two years older - - two - - almost two and a half years older than how she was when this crime occurred.

She's, obviously, gotten - - she - - she dies her hair. She's gotten bigger. As she says, she - - her breasts weren't as - - as developed. You can imagine the 12-year olds that you know. And you can think of what you would expect from - - from a 12-year old. And when you think of that, that's where the law and why the law is there as it is today. It's to protect kids, whether they are super innocent or whether they are maybe not so innocent, but think that they know more than they really do.

And what we are here today to do and what your job is, is to find the defendant guilty of the crime that he committed and those crimes are clearly the crimes against [the victim.]

Prosecutors should not resort to civic duty arguments that appeal to the prejudices of jurors, *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995), or arguments that ask jurors to sympathize with the victim, *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984).

Viewed in context, the remarks did not improperly suggest that the jury should convict defendant on the basis of sympathy or civic duty. The prosecutor's remarks were made during rebuttal argument and occurred after a lengthy and detailed discussion of the evidence during closing argument. Moreover, the remarks were isolated and were not so inflammatory that defendant was prejudiced. See *People v Mayhew*, 236 Mich App 112, 122-123; 600 NW2d 370 (1999). Furthermore, in its final instructions, the trial court instructed the jurors that they should not be influenced by sympathy or prejudice, that the case should be decided on the basis of the evidence, and that they were to follow the court's instructions. The instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). "Jurors are presumed to follow their instructions." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Consequently, this claim does not warrant reversal.

Affirmed.

/s/ Christopher M. Murray

/s/ Richard A. Bandstra

/s/ Karen M. Fort Hood